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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/509,803

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Ian David Kaehne

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EXAMINER

PRATT, HELEN F

ART UNIT

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MAIL DATE

DELIVERY MODE

10/14/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/509,803	Applicant(s) KAEHNE, IAN DAVID	
	Examiner Helen F. Pratt	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 July 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4,6-42,47,48 and 55-62 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4,6-42,47,48 and 55-62 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-4, 6- 42, 47-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over "A survey on the composition of mineral water and identification of natural mineral water" (Luk) in view of Someya and Tuffley (WO02/00043), Lindon (4,325,975), and Mehansho et al. (7,090,878) and Dyrr et al. (WO 01/52672).

The article "A survey on the composition of mineral water and identification of natural mineral water" (Luk) discloses the comparison of sixty mineral water samples from different sources (abstract). The water can contain the addition of minerals, page 309, 1st para., line 13. The reference discloses all of the required minerals in various amounts. The minerals in groups 3 and 4 are not actually required by the language of claim 1 since zero amounts are listed. The

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reference to Luk discloses amounts in group 1 and b at within the claimed amounts except for phosphorous (p 311). Claim 1 differs from the reference in the use of phosphorous in the mineral waters. However, Someya discloses that it is known to make a beverage from coral sand, which contains phosphorous (Table 1, 6th item). Also, the other minerals are disclosed by Someya. Tuffley discloses a beverage which contains a supplement of minerals in particular amounts of 50 Mg/l of calcium, 45 mg of phosphorous, and manganese glycinate, magnesium glycinate in amounts of from 75 mg. and in amounts of 2.5 mg/l, magnesium in amounts of 5 mg (page 9). Mehansho et al. disclose a mineral fortified water composition containing calcium, iron, zinc, copper, manganese iodine, magnesium (abstract). Lindon discloses a mineralized drinking water containing strontium, magnesium, calcium and lithium (abstract). The particular amounts are seen as being within the skill of the ordinary worker. Dyrr et al. disclose that 37 elements can be found in water and 24 are essential for proper nutrition and health (page 7, lines 10-30).

Claim 1 further contains phosphorous, potassium, silicon, sodium and chlorine in particular amounts. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a water product containing minerals, properties such as taste and nutrition are important. It appears that the precise ingredients as well as their proportions affect the taste and nutrition of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.

As to the other minerals, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Each ingredient is used for its known function. Nothing has been shown as to a coaction of ingredients that produce anything new or unexpected. Adding particular amounts of ingredients to make a beverage taste good is within the skill of the ordinary worker as this is a method of trial and error. Therefore, it would have been obvious to make a beverage containing known minerals in particular amounts as shown by the combined references.

Claim 2 further requires a particular pH for still water, aerated or carbonated water. The pH of pure water is 7. Claim 41 requires that the water is still water with a pH of 7.2 to 7.6. The reference to *Mehansho et al.* disclose the use of a fortified water with minerals to be between 4 and 9.5. Ph's of course can easily be adjusted with acids and bases. Therefore, it would have been obvious to adjust the ph to a required level.

Claims 2 and 42 further require the addition of carbon dioxide. The addition of carbon dioxide to water is old and nothing new is seen in bubbly water. Therefore, it would have been obvious to add a known gas to water for its known function.

Claims 3, 4, 8-12 further require particular concentration of minerals, and claims 13-40 that the minerals come from particular sources. However, these sources are well known and nothing new is seen in their use. It would have been within the skill of the ordinary worker to use food safe sources of minerals. Applicants have not made any claim that they have discovered these particular sources of minerals. Therefore, it would have been obvious to use known food safe sources of minerals to make the claimed composition.

Claims 47-48 further require making concentrated preparations of the various groups and adding them to water in particular amounts. However, method limitations are not given weight in a composition claim. Nothing new is seen in the concentration of water which merely requires boiling away particular amounts of water or the use of less water. Certainly, the use of concentrated solutions is more feasible, than large quantities of water. Therefore, it would have been obvious to make concentrated solutions of minerals.

Claims 55-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1- 4, 8-52 above, and further in view of Jakubowicz (DE19700368).

Claims 55 and 56 further require adding the claimed mineral water to a beverage in particular amounts or to use a concentrate of the mineral water. However, dilution of beverages is very well known as in diluting a concentrate such as orange juice or dried beverage compositions. Jakubowicz discloses adding a concentrated divalent ion salt/citric acid mixture

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solution to drink ingredients. The particular concentration is seen to have been within the skill of the ordinary worker. Therefore, it would have been obvious to add concentrated mineral solutions to dilute beverages to any concentration.

Nothing new is seen as in claim 58 of adding concentrated mineral waters to dilute a beverage, as the beverage will be diluted no matter the type of water. As above it is known to mineralize water. Nothing new is concentrating a mineral solution. Therefore, it would have been obvious to dilute a beverage as in claims 58 and 59.

Claims 60 and 61 further require diluting beer and other alcoholic beverages and tea. Mehansho et al. disclose that it is known to flavor water with botanic flavors and tea and hops. No patentable distinction is seen in flavoring water or in diluting a flavorant. Therefore, it would have been obvious to dilute a flavored beverage with water.

Claims 62 further contain minimum amounts of trace minerals, which are listed at so low a concentration that they are not likely to affect the taste of the beverage. In addition, they are known trace mineral. Therefore, it would have been obvious to make a composition with very small amounts of trace minerals since they are needed in the body at low levels, and regard to In re Boesch, it would have been obvious to add at amounts which would have been suitable to make a beverage nutritious and tasty. As to In re Levin, applicant has added various minerals, and has not produced anything new or unobvious as each of the minerals is used for its known function and no coaction of ingredients is seen.

Allowable subject matter

Claims 6, 7 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and

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any intervening claims. The limitations of claims 6, and 7 additionally need to be added to claim 1 and other independent claims.

ARGUMENTS

Applicant's arguments filed 7-13-09 have been fully considered but they are not persuasive.

Applicant's Declaration has been noted. The Declaration contains information as to a taste test using five samples for testing using the claimed minerals in particular amounts. Applicant tasted the samples and arrived at the best tasting beverage. However, as above, it would have been obvious to use particular amounts of the first 8 minerals as this amounts to using more or less of each mineral. The trace minerals are not used in amounts that would have affected the taste of the beverage. As above, no unobvious outcome is seen in raising or lowering amounts of ingredients to make a drinkable mineral beverage.

Applicants have amended the claims, but not in the way that would have made them allowable.

Applicant argues that the taste qualities of mineral water can be influenced by the mineral concentration in the water and that this is unexpected and that the art does not suggest such. This is exactly what a recipe does, uses various amounts of ingredients knowing how they taste to make an acceptable product. The cited references are more to making a beverage for health purposes, but that does not mean that one can not lower the amounts of ingredients to make a palatable product.

Applicant argues that the references to Tuffley and Mehansho use flavoring agents to make the taste and also gums. However, they are making medicinal drinks that must have particular amounts of minerals to add to the health of individuals. Applicants have not excluded any of these ingredients from their claims.

Applicants use a balancing approach, but this is known as an any recipe. The cited references show that it is known to use various minerals in a beverage for health purposes.

A classification system used to note how minerals taste is a good idea, but that means that one is basically adjusting amounts and ingredients, and nothing inventive is seen in this.

Applicant argues that Luk does not show the claimed levels of phosphorous, but only potassium. However, it would have been impossible to show applicants particular amounts, due to the many combinations and variations of minerals that can be made.

Applicants argue that Luk and Someya do not arrive at the claimed invention and that using various amounts of coral would not provide the claimed composition. However, as above, it would be impossible to present references to show one man's idea of what a mineral water should taste like. Generally one does not use himself as the taster, if independent results are to be shown.

Applicant discusses the Declaration, and the samples with different minerals in particular amounts. However, the claims are presented in ranges. In picking out various ranges of minerals, applicant states that phosphorous is used in a different amount than claimed. However, other amounts of ingredients are used, which could have offset the taste of this amount of phosphorous. Someya was used to show that phosphorus is used in beverages (a well known fact since it is used in soft drinks).

Applicant argues that recipes use ingredients that are well known. However, as in the combined references the taste of minerals is known. Certainly, using a tiny amount which would actually not impact on the taste would have been obvious. As to the larger amounts, the taste of a mineral is determined by just trying it, and then mixing other tasty minerals together, and this is not seen as inventive.

As above, adjusting the levels of minerals is not seen as inventive, and the references are used to show that it is known to make various mineral beverages.

Applicant argues as to claims 53-61 that adding the claimed combination of minerals to a beverage would have not been obvious. However, as above, it would have been within the skill of the ordinary worker to adjust the level of minerals to make the claimed invention. Applicant discloses in there specification on page 23 that “solutions containing varying concentrations of simple salts And varying concentrations and combinations” were tasted to find the most acceptable taste. This is exactly what is done in a recipe adjusting and trying out various tastes.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Helen F. Pratt/

Primary Examiner, Art Unit 1794

Hp 10—7-09